Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–53–08 OF 2015 (W) AND 02–59–09 OF 2015 (W)
SURIYADI, HASAN LAH, ZAINUN ALI, AZAHAR MOHAMED AND BALIA YUSOF FCJJ
9 AUGUST 2016

Land Law — Indefeasibility of title and interests — Forged transfer — Immediate purchasers not privy to fraud or forgery — Property transferred to subsequent purchaser for value before true owner discovered fraud — Whether indefeasibility deferred or immediate — Whether transfer liable to be set aside at instance of registered proprietor — Whether High Court and Court of Appeal erred in declaring transfer of property from original owners to immediate purchasers was void — Whether in lieu of retransfer of property a claim in damages available to plaintiff as true owner of property under s 340 of the National Land Code — Whether claim under s 340 an action in rem — Whether High Court and Court of Appeal erred in holding that immediate purchasers were statutorily bound to pay damages because they were in no position to return property to plaintiff

Rozdenil bin Toni ('the plaintiff') was the administrator of the estate of his deceased parents, which included a piece of land situated in Cheras, Kuala Lumpur ('the property'). The plaintiff's elder brother ('the second defendant') wrongfully and illegally sold and transferred the property to Low Huat Cheng and Tan Goat Eng ('the third and fourth defendants') for a price of RM500,000 using a forged instrument. The third and fourth defendants, who were not privy to the forgery, had sold the property to Teu Shek Fai ('the fifth defendant'), the subsequent purchaser, for RM730,000. The property had then been charged to HSBC Bank ('the sixth defendant') as security for a loan granted by it to the fifth defendant. When the fifth defendant defaulted in the repayment of the loan, the sixth defendant had foreclosed the property. Thereafter, the property had been auctioned off to Kotanaz Sdn Bhd ('the seventh defendant'), who is the current registered owner of the property. Sometime in April 2012, the plaintiff discovered that the second defendant had unlawfully transferred the property to the third and fourth defendants. Consequently, the plaintiff commenced an action against the Pengarah Tanah dan Galian Wilayah Persekutuan ('the first defendant') and the second to seventh defendants. The plaintiff's claim against the defendants was anchored on two distinct causes of action, namely a statutory claim under s 340 of the National Land Code ('the NLC'), whereby the plaintiff was essentially seeking an order to cancel all the dealings pertaining to the property and to have the ownership of the property reverted back to the estate of his parents as the true

original owner, and a claim based on the tort of negligence, whereby he sought damages from all the defendants. Judgment in default was entered against the second defendant. The fifth, sixth and seventh defendants successfully brought an application to strike out the plaintiff's claim against them. Thus the trial of the plaintiff's action in the High Court was primarily against the first, third and fourth defendants. The trial judge dismissed the plaintiff's claim against the first defendant. In relation to the third and fourth defendants, the High Court applied the landmark decision of the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 and held that the title of the third and fourth defendants, as immediate purchasers of the property, was defeasible, as registration in their names had been obtained by means of an insufficient or void instrument. Further, the High Court made a finding that the defence afforded by s 340(3), namely deferred indefeasibility, was only available to a subsequent purchaser, which the third and fourth defendants were not. However, since the property could not be reverted back to the plaintiff, the third and fourth defendants were ordered to pay monetary damages and compensation to the plaintiff that was similar to the value of the property as at the date of the judgment. The third and fourth defendants appealed to the Court of Appeal, which affirmed the decision of the High Court that the third and fourth defendants pay damages to the plaintiff in lieu of the retransfer of the property. However, the Court of Appeal varied the date of the basis of assessment of damages from the date of the judgment to the date of execution of the Form 14A between the fraudulent second defendant and the third and fourth defendants. The third and fourth defendants had now obtained the leave of this court to proceed with the appeal against the decision of the Court of Appeal. Meanwhile the plaintiff, who was dissatisfied with that part of the decision of the Court of Appeal to vary the date of the basis of assessment of damages, had also obtained leave to proceed with his appeal against the decision of the Court of Appeal. Both related appeals were heard together.

Held, allowing the third and fourth defendants' appeal with costs and dismissing the plaintiff's appeal:

(1) In the landmark decision of the Federal Court in *Tan Ying Hong*'s case it was held that a purchaser who acquired the property by way of a void instrument did not acquire an immediate indefensibility of interest on the land but a deferred one. The Federal Court also ruled that the fact that the purchaser had acquired the interest in question in good faith for value was not in issue, because once the court was satisfied that the transfer of the property arose from the use of a void instrument, it automatically followed that the transfer was liable to be set aside at the instance of the registered proprietor. It is also settled law now that the defeasible title of a bona fide immediate purchaser only became indefeasible when it was subsequently passed to a bona fide subsequent purchaser. However, the facts of this case are different from the facts in

Tan Ying Hong's case. Nevertheless, according to the present state of the law the third and fourth defendants as immediate purchasers of a title tainted by a forged power of attorney, had acquired a title that was not indefeasible. The fact that the third and fourth defendants were bona fide purchasers could not by that fact alone give a shield of indefeasibility. On the present state of the law, the defeasible title of the third and fourth defendants was still liable to be set aside before the fifth defendant, the subsequent purchaser became the holder of the registered title of the property on 11 August 2010. However, by the time the plaintiff as the true original registered proprietor commenced the present action on 9 August 2012, the defeasible title of the third and fourth defendants as bona fide immediate purchasers had become indefeasible when it was subsequently passed to the fifth defendant, a bona fide subsequent purchaser. It therefore followed that the High Court and the Court of Appeal had gone too far to declare that the transfer of the property from the original owners (that is to say the parents of the plaintiff) to the third and fourth defendants was void (see paras 32, 38–39 & 45–47).

(2) The issue as to whether in lieu of the retransfer of the property, a claim in damages was available to the plaintiff as the true owner of the property under s 340 of the NLC could only be approached on the basis of the provision itself, ie the plaintiff's case should stand and fall on the basis of this specific provision. Legal rights were either in rem or in personam. The claim under s 340 of the NLC was a statutory claim and the relief was explicitly specified therein, that is to say, setting aside the title or interest in question. It was apparent that the provision did not envisage a relief in damages at all; there was clearly no provision in relation to damages. Thus, a claim under s 340 of the NLC was an action in rem brought for the assertion of property, which was enforceable against the world at large, as opposed to right in personam for damages which was enforceable against a specified person and arose from an obligation whether in contract or in tort. In short, there was no right to an award of damages unless the court had power to award it. In the circumstances, by awarding damages to the plaintiff, the High Court and the Court of Appeal had extended the scope of s 340 of the NLC, which both courts had no jurisdiction to do. The award of damages was not within the contemplation of the legislature. Thus, both the High Court and the Court of Appeal erred in law and in fact culminating in a miscarriage of justice in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. This was in itself sufficient to warrant appellate interference (see paras 48–51 & 55–57).

(3) In the circumstances of this case, damages as a relief in a claim in personam founded in tort was only available if the plaintiff had proven that the third and fourth defendants had wronged him in some way.

However, when it came to adducing evidence, the plaintiff had not at all brought home the case of negligence against the third and fourth defendants. There was no attempt whatsoever by the plaintiff to affix any knowledge of the defective power of attorney on the part of the third and fourth defendants. On the contrary, the third and fourth defendants had proven their defence as bona fide purchasers of the property for value without notice. The plaintiff had proven that he had suffered loss. However, his remedy was against the second defendant, who was the one who wrongfully caused the plaintiff's loss. As the plaintiff had obtained judgment in default against the second defendant, he should proceed to assess damages against the second defendant. Consequently, it was not necessary to answer the calculation of damages question (see paras 60–63).

[Bahasa Malaysia summary

Rozdenil bin Toni ('plaintif') ialah pentadbir kepada tanah pusaka ibubapa yang telah mati, yang termasuklah sebidang tanah terletak di Cheras, Kuala Lumpur ('hartanah itu'). Abang plaintif ('defendan kedua') telah secara salah dan tidak sah menjual dan memindah milik hartanah itu kepada Low Huat Cheng dan Tan Goat Eng ('defendan-defendan ketiga dan keempat') untuk harga RM500,000 menggunakan instrumen yang dipalsukan. Defendan-defendan ketiga dan keempat, yang bukan privi kepada pemalsuan itu, telah menjual hartanah itu kepada Teu Shek Fai ('defendan kelima'), pembeli berikutnya, untuk RM730,000. Hartanah itu telahpun dicagarkan kepada HSBC Bank ('defendan keenam') sebagai jaminan untuk pinjaman yang diberikan olehnya kepada defendan kelima. Apabila defendan kelima gagal dalam bayaran balik pinjaman itu, defendan keenam telah merampas hartanah itu. Selepas itu, hartanah itu telah dilelong kepada Kotanaz Sdn Bhd ('defendan ketujuh'), yang merupakan pemilik berdaftar semasa hartanah itu. Sekitar April 2012, plaintif telah mendapati bahawa defendan kedua telah menyalahi undang-undang memindah milik hartanah itu kepada defendan-defendan ketiga dan keempat. Berikutan itu, plaintif telah memulakan tindakan terhadap Pengarah Tanah dan Galian Wilayah Persekutuan ('defendan pertama') dan defendan-defendan kedua hingga ketujuh. Tuntutan plaintif terhadap defendan-defendan berdasarkan dua kausa tindakan berbeza, iaitu tuntutan statutori di bawah s 340 Kanun Tanah Negara ('KTN'), di mana plaintif memohon terutamanya perintah untuk membatalkan semua urusan berkaitan hartanah itu dan agar milikan hartanah itu dikembalikan kepada harta pusaka ibubapanya sebagai pemilik asal sebenar, dan satu tuntutan berdasarkan tort kecuaian, di mana di memohon ganti rugi daripada kesemua defendan itu. Penghakiman ingkar telah dimasuki terhadap defendan kedua. Defendan-defendan kelima, keenam dan ketujuh telah berjaya memulakan permohonan untuk membatalkan tuntutan plaintif terhadap mereka. Oleh itu perbicaraan tindakan plaintif di Mahkamah Tinggi adalah khususnya terhadap defendan-defendan pertama, ketiga dan keempat.

Hakim perbicaraan telah menolak tuntutan plaintif terhadap defendan pertama. Berkenaan defendan-defendan ketiga dan keempat, Mahkamah Tinggi mengguna pakai keputusan penting Mahkamah Persekutuan dalam kes *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 dan memutuskan bahawa hakmilik defendan-defendan ketiga dan keempat, sebagai pembeli terdekat hartanah itu, adalah boleh disangkal, kerana pendaftaran dalam nama mereka telah diperoleh melalui instrumen yang tidak mencukupi atau tidak sah. Selanjutnya, Mahkamah Tinggi telah membuat dapatan bahawa pembelaan yang diberikan oleh s 340(3), iaitu keadaan tidak boleh sangkal yang ditunda, hanya tersedia untuk pembeli berikutnya, yang mana bukanlah defendan-defendan ketiga dan keempat. Walau bagaimanapun, oleh kerana hartanah itu tidak dapat dikembalikan kepada plaintif, defendan-defendan ketiga dan keempat telah diperintahkan untuk membayar ganti rugi dalam bentuk wang dan pampasan kepada plaintif yang sama dengan nilai hartanah itu sehingga tarikh penghakiman. Defendan-defendan ketiga dan keempat telah merayu kepada Mahkamah Rayuan, yang mengesahkan keputusan Mahkamah Tinggi bahawa defendan-defendan ketiga dan keempat telah membayar ganti rugi kepada plaintif menggantikan pemindah milikan semula hartanah itu. Walau bagaimanapun, Mahkamah Rayuan telah menukar tarikh asas penaksiran ganti rugi dari tarikh penghakiman kepada tarikh pelaksanaan Borang 14A antara defendan kedua yang memalsukan itu dan defendan-defendan ketiga dan keempat. Defendan-defendan ketiga dan keempat kini telah memperoleh kebenaran mahkamah ini untuk memulakan rayuan terhadap keputusan Mahkamah Rayuan. Manakala plaintif, yang tidak berpuas hati dengan keputusan bahagian itu juga telah memperoleh kebenaran untuk memulakan rayuannya terhadap keputusan Mahkamah Rayuan. Kedua-dua rayuan yang berkaitan itu telah didengar bersama.

Diputuskan, membenarkan rayuan defendan-defendan ketiga dan keempat dengan kos dan menolak rayuan plaintif:

(1) Dalam keputusan penting Mahkamah Persekutuan dalam kes *Tan Ying Hong* ia telah diputuskan bahawa seorang pembeli yang memperoleh hartanah melalui instrumen yang tidak sah tidak memperoleh keadaan tidak boleh sangkal dengan serta merta berhubung kepentingan atas tanah itu tetapi suatu yang ditunda. Mahkamah Persekutuan juga memutuskan bahawa fakta yang pembeli telah memperoleh kepentingan yang dipersoalkan dengan niat baik untuk nilai bukan suatu isu, kerana selepas mahkamah berpuas hati bahawa pindah milik hartanah yang timbul daripada penggunaan instrumen yang tidak sah, ia secara automatik mengikut bahawa pindah milik itu boleh diketepikan pada pemilik yang berdaftar. Ia juga undang-undang tetap kini bahawa hakmilik boleh sangkal pembeli serta merta yang berniat suci hanya menjadi tidak boleh disangkal apabila ia kemudiannya berpindah kepada pembeli berniat suci yang berikutnya. Walau bagaimanapun, fakta kes ini

adalah berbeza daripada fakta dalam kes *Tan Ying Hong*. Namun begitu, menurut kedudukan undang-undang sekarang defendan-defendan ketiga dan keempat sebagai pembeli serta merta terhadap hakmilik yang dicemari oleh surat kuasa wakil yang dipalsukan, telah memperoleh hakmilik yang bukan tidak boleh sangkal. Fakta bahawa defendan-defendan ketiga dan keempat merupakan pembeli-pembeli berniat suci tidak boleh berdasarkan fakta itu sahaja memberi perlindungan yang tidak boleh sangkal. Berdasarkan kedudukan perundangan, hakmilik boleh sangkal defendan-defendan ketiga dan keempat masih boleh diketepikan sebelum defendan kelima, pembeli berikutnya menjadi pemegang hakmilik berdaftar hartanah itu pada 11 Ogos 2010. Walau bagaimanapun, pada masa plaintif sebagai pemilik berdaftar asal sebenar memulakan tindakan ini pada 9 Ogos 2012, hakmilik boleh sangkal defendan-defendan ketiga dan keempat sebagai pembeli-pembeli serta merta berniat suci telah menjadi tidak boleh sangkal apabila ia dipindah milik kepada defendan kelima, pembeli berikutnya yang berniat suci. Oleh itu diikut bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah terlanjur dalam mengisytiharkan bahawa pindah milik hartanah daripada pemilik-pemilik asal (iaitu ibubapa plaintif) kepada defendan-defendan ketiga dan keempat adalah tidak sah (lihat perenggan 32, 38–39 & 45–47).

(2) Isu sama ada dalam menggantikan pemindah milikan semula hartanah itu, suatu tuntutan ganti rugi tersedia kepada plaintif sebagai pemilik sebenar hartanah itu di bawah s 340 KTN hanya boleh digunakan berdasarkan peruntukan itu sendiri iaitu kes plaintif sepatutnya kekal dan berasaskan peruntukan spesifik ini hak perundangan adalah sama ada in rem atau in personam. Tuntutan di bawah s 340 KTN adalah tuntutan statutori dan relief dinyatakan secara terperinci, iaitu, mengetepikan hakmilik atau kepentingan yang dipersoalkan. Ia jelas bahawa peruntukan itu tidak memberikan relief untuk ganti rugi langsung; jelas tiada peruntukan berkaitan ganti rugi. Oleh itu, tuntutan di bawah s 340 KTN adalah suatu tindakan in rem dimulakan untuk memperoleh hartanah, yang oleh dikuatkuasakan kepada semua, sebaliknya hak in personam untuk ganti rugi boleh dikuatkausakan terhadap seorang yang spesifik dan timbul daripada obligasi sama ada dalam kontrak atau tort. Pendek kata, tiada hak untuk suatu award ganti rugi kecuali mahkamah mempunyai kuasa untuk mengawardkannya. Dalam keadaan itu, dengan mengawardkan ganti rugi kepada plaintif, Mahkamah Tinggi dan Mahkamah Rayuan telah memperluaskan skop s 340 KTN, yang mana kedua-dua mahkamah tidak mempunyai bidang kuasa untuk berbuat sedemikian. Award ganti rugi bukan dalam jangkauan perundangan itu. Oleh itu kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah terkhilaf dari segi undang-undang dan fakta akibat salah melaksanakan keadilan dalam memutuskan bahawa

defendan-defendan ketiga dan keempat tidak berada dalam kedudukan untuk mengembalikan hartanah itu kepada plaintif, mereka terikat secara statutori untuk menghadapi kerugian dengan membayar ganti rugi. Ini dengan sendirinya mencukupi untuk mewajarkan campur tangan pihak rayuan (lihat perenggan 48–51 & 55–57).

(3) Dalam keadaan kes ini, ganti rugi sebagai relief dalam tuntutan in personam terdapat dalam tort hanya tersedia jika plaintif dapat membuktikan bahawa defendan-defendan ketiga dan keempat telah membuat salah terhadapnya dalam apa cara. Walau bagaimanapun, apabila ia berhubung mengemukakan keterangan, plaintif tidak langsung mengutarakan kes berhubung kecuaian terhadap defendan-defendan ketiga dan keempat. Tiada percubaan apa pun oleh plaintif untuk memberi apa-apa pengetahuan tentang surat kuasa wakil yang cacat itu di pihak defendan-defendan ketiga dan keempat. Sebaliknya, defendan-defendan ketiga dan keempat telah membuktikan pembelaan mereka sebagai pembeli-pembeli berniat suci hartanah itu untuk nilai tanpa notis. Plaintif telah membuktikan bahawa dia mengalami kerugian. Walau bagaimanapun, remedinya adalah terhadap defendan kedua, yang merupakan orang yang salah menyebabkan kerugian plaintif. Oleh kerana plaintif telah memperoleh penghakiman ingkar terhadap defendan kedua, dia patut menaksir ganti rugi terhadap defendan kedua. Berikutan itu, ia tidak perlu untuk menjawab pengiraan ganti rugi yang dipersoalkan (lihat perenggan 60–63).]

Notes

For cases on forged transfer, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3661–3674.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Bachan Singh v Mahinder Kaur & Ors [1956] 1 MLJ 97 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (folld)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105, PC (refd)

Frazer v Walker and Others [1967] 1 All ER 649; [1967] 1 AC 569, PC (refd)

Hay Or Bourhill v Young [1942] 2 All ER 396, HL (folld)

Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal [2001] 3 SLR (R) 220, CA (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581; [2007] 5 CLJ 673, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (distd)
Tara Rajaratnam v Datuk Jagindar Singh & Ors [1983] 2 MLJ 127 (refd)
The Cobar Corporation Limited and Rubind Henrik Corbett (Trustee) v The Attorney-General for New South Wales [1909] HCA 52; [1909] 9 CLR 378, HC (refd)
Webb v Webb [1994] QB 696 (refd)

Legislation referred to

Land Titles Act [SG]
National Land Code 1965 ss 340, 340(1), (2), (2)(b), (3), Form 14A

Appeal from: Civil Appeal No W-02(NCVC)(W)-1138–07 of 2014 (Court of Appeal, Putrajaya)

VS Viswanathan (VS Viswa & Co) in Civil Appeal No 02–53–08 of 2015 (W) for the appellants.
Yusman Mohd Badar (Azam Rashid with him) (Chambers of Yusman Azlin Anwar) in Civil Appeal No 02–53–08 of 2015 (W) for the respondent.
Yusman Mohd Badar (Azam Rashid with him) (Chambers of Yusman Azlin Anwar) in Civil Appeal No 02–59–09 of 2015 (W) for the appellant.
VS Viswanathan (VS Viswa & Co) in Civil Appeal No 02–59–09 of 2015 (W) for the respondents.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are two related appeals before this court arising from the same action in the High Court, namely Kuala Lumpur Civil Suit No 21NCVC-195–08 of 2012. These two appeals bring into focus the all too familiar stories of innocent landowners, as in the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, who found themselves deprived of their property by forgery, or by means of forged instruments of dealings.

[2] The first appeal, which is Federal Court Civil Appeal No 02–53–08 of 2015 (W) is by Low Huat Cheng and Tan Goat Eng (the third and fourth

defendants in the High Court). It is against the decision of the Court of Appeal that affirmed the judgment of the High Court in which the High Court held that the third and fourth defendants' title to the property in question should be set aside and that further, the third and fourth defendants were liable to pay damages to the plaintiff. In respect of this appeal, leave to appeal was granted by this court on the following question of law:

> Where the immediate purchaser of a registered land (and who has been a bona fide purchaser for value without notice throughout) has already transferred that registered land to a subsequent purchaser (who also has been a bona fide purchaser for value without notice) is a claim in damages available to that true owner against that immediate purchaser pursuant to Section 340(2)(b) of the National Land Code *1965?*
>
> *(The remedy question)*

[3] The second appeal, which is Federal Court Civil Appeal No 02–59–09 of 2015 (W) is by Rozdenil bin Toni (the plaintiff in the High Court) against part of the order of the Court of Appeal in that the date for the basis of assessment of damages to the plaintiff was varied from 3 July 2014 (the date of the judgment of the High Court) to the date when the property was transferred to the third and fourth defendants by use of the false power of attorney, namely 17 July 2008. In respect of this appeal, leave to appeal was granted on the following question of law:

> In quantifying the damages available to the true owner against the immediate purchaser pursuant to Section 340(2)(b) National Land Code 1965, whether the damages to be assessed is as at the date of the true owner's deprivation or as at the date of judgment?
>
> *(The calculation of damages question)*

[4] We shall be referring to parties in this judgment as they were in the High Court.

[5] The subject matter of the dispute between the parties revolved around a landed property held under Geran No 32298, Lot No 7186, Mukim of Cheras, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the property'). This dispute arose in the context of determining the competing interests of the parties, arising as a consequence of an initial transfer of the property from the plaintiff to the third and fourth defendants by way of a forged power of attorney.

[6] In the main, these appeals focus on the claim for damages by the plaintiff as the true original registered proprietor of the property against the third and fourth defendants, who as immediate purchasers, had acquired the property by way of a sale by a third party using a forged power of attorney.

BACKGROUND FACTS

[7] The salient background facts and events giving rise to these appeals are as follows. The plaintiff was the administrator of the estates of his deceased parents, Toni bin Ismail and Normy bt Mohamed Khatif. They passed away on 7 October 2002 and 7 September 2005 respectively. Their estate included the property in question.

[8] Originally, the plaintiff had sued altogether seven defendants. The first defendant was the Pengarah Tanah dan Galian Wilayah Persekutuan. The plaintiff's claim against the first defendant was premised on negligence on the part of the first defendant in accepting the registration of the memorandum of transfer of the property to the third and fourth defendants.

[9] The second defendant was the plaintiff's elder brother, Jusrizal bin Toni who wrongfully and illegally sold and transferred the property, which was registered on 17 July 2008 to the third and fourth defendants for a price of RM500,000 using a forged instrument. As observed by the learned High Court judge, 'it is obvious that the culprit was the second defendant'.

[10] The following facts are irrefutable. The power of attorney utilised by the second defendant was a false instrument because it carried a date of execution well after the death of the plaintiff's (and the second defendant's) parents. As mentioned earlier, they died on 7 October 2002 and 7 September 2005, respectively. Yet, the power of attorney carried the date 4 December 2006. Moreover, the name of the commissioner for oaths that had purportedly witnessed and attested the power of attorney was also false.

[11] So far as the evidence goes, the third and fourth defendants were not privy to the forgery. In this regard, the Court of Appeal made an express finding to the effect that the third and fourth defendants had purchased the property in good faith for value.

[12] More significant still, the third and fourth defendants subsequently had on 31 March 2010 sold the property to Teu Shek Fai ('the fifth defendant'), the subsequent purchaser for RM730,000 which sale was registered on 11 August 2010. The property had then been charged to HSBC Bank ('the sixth defendant') as security for a loan granted by it to the fifth defendant.

[13] As events unfolded, the fifth defendant defaulted in the repayment of the loan. The sixth defendant then foreclosed the property. Thereafter, the property was auctioned off and purchased at public auction held on 5 April 2012 by Kotanaz Sdn Bhd ('the seventh defendant'), who is the current registered owner of the property.

[14] The problem arose when, after a land search which was conducted in or around April 2012, the plaintiff discovered that a transfer in relation to the property had occurred from the second defendant to the third and fourth defendants pursuant to a memorandum of transfer dated 18 March 2008 witnessed by a solicitor by using a power of attorney allegedly granted by Toni bin Ismail and Normy bt Mohamed Khatif.

[15] In due course, the plaintiff commenced the present action against all the seven defendants by filing a writ of summons and the statement of claim on 9 August 2012. It is material to point out that the plaintiff anchored his claim against the defendants on two distinct causes of action. As we shall explain later, this is an important point that should be kept in mind. The first was a statutory claim under s 340 of the National Land Code ('the NLC'). The plaintiff was essentially seeking for an order to cancel all the dealings pertaining to the property and to have the ownership of the property reverted back to the estate of his parents, that is to say, the true original owner. The second was based on tort of negligence, and for that the plaintiff sought damages from all the defendants.

[16] The second defendant did not enter appearance in the court below and judgment in default was therefore entered against him. In the High Court, the fifth, sixth and seventh defendants successfully brought an application to strike out the plaintiff's claim against them. There was no appeal to the Court of Appeal against this decision.

[17] Therefore, the trial of the plaintiff's action in the High Court was primarily against the first, third and fourth defendants.

DECISION OF THE HIGH COURT

[18] The plaintiff's claim against the first defendant was dismissed by the High Court. There was no appeal to the Court of Appeal against that part of the decision.

[19] In relation to the third and fourth defendants, the High Court applying the landmark decision of this court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 held that the title of the third and fourth defendants, as immediate purchasers of the property, was defeasible, as registration in their names had been obtained by means of an insufficient or void instrument. As such s 340(2)(b) of the NLC came into play, rendering their title defeasible. Further, the High Court made a finding that the defence afforded by s 340(3), namely deferred indefeasibility, was only available to a subsequent purchaser, which the third and fourth defendants were not.

[20] It was the decision of the High Court that while the third and fourth defendants, as the immediate purchasers, had purchased the property in good faith for value, this was of no avail, in light of the express provision of s 340(2)(b) of the NLC which stipulates that where the registered title or interest of a person is obtained by forgery or by means of a void instrument the title or interest of any such person or body shall not be indefeasible. In the words of the learned High Court judge:

> It was repeatedly argued and stressed by the learned counsel for the third and fourth defendants that the third and fourth defendants have no knowledge about the ill doings of the second defendant, and was at all material time not aware that the said PA was fake. The third and fourth defendants strenuously maintained that they were bona fide purchasers for valuable consideration of the said property. It is my considered opinion that such an averment is no defence to the plaintiff's challenge made under s 340(2)(b) of the NLC to their title to the said property. Firstly, the defence of bona fide purchaser for value applies to subsequent purchaser only. The proviso of s 340(3) of the NLC does not apply to the third and fourth defendants because they were immediate purchasers. The thirrd and fourth defendants therefore cannot rely on the said proviso. This is what was precisely decided by the *Tan Ying Hong*'s case. The fact that the third and fourth defendants had purchased the said Property in good faith for value is not in issue because as was held by Arifin Zakaria CJ (Malaya) as he was then, in *Tan Ying Hong*'s case, once the court is satisfied that the transfer (or charges as in that case) arose from void instruments, it automatically follows that it is liable to be set aside at the instant of the original registered proprietor (ie the plaintiff herein).

[21] In holding that damages was the appropriate remedy, the learned High Court judge explained as follows:

> If the said property is still in name of the third and fourth defendants, I would have no hesitation in ordering that the same be returned to the rightful owner, that is, the plaintiff. As it stands the said property is no longer available to the plaintiff because it is now owned by the seventh defendant who had purchased it at the public auction.
>
> I am of the opinion that since the said property cannot be ordered to be reverted back to the plaintiff, the third and fourth defendants must pay monetary damages and compensation to the plaintiff that is similar to the value of the said property as at today, that is, the date of this judgment, and such damages and compensation shall be assessed by the registrar. I think this is a fair and reasonable approach. The third and fourth defendants should not benefit from the whole episode. After all they have sold the said property to the fifth defendant at a higher price than what they paid to the second defendant. The third and fourth defendants are of course not without recourse. They are certainly entitled to claim from the second defendant indemnity and compensation, though admittedly it may not mean much since the second defendant may not be easily found. Be that as it may, the law is clear in that the third and fourth defendants' title to the said property when they purchased it from the second defendant is clearly liable to be set aside because of the said PA was a fake and a forgery.

[22] Accordingly, the High Court allowed the plaintiff's claim against the third and fourth defendants as follows:

(a) declaration that the transfer of the said property from the original owners (ie the parents of the plaintiff) to the third and fourth defendants vide Presentation No 21840/2008 is void;

(b) that the third and fourth defendants to pay damages equal to the market value of the said property as at the date of this judgment and such market value to be determined and assessed by the registrar;

(c) interest at the rate of 5%pa on the said damages from the date it is ordered by the registrar until full realisation; and

(d) the third and fourth defendants to pay costs of RM10,000 to the plaintiff.

DECISION OF THE COURT OF APPEAL

[23] The Court of Appeal affirmed the decision of the High Court that although the third and fourth defendants were bona fide purchasers for value without notice this issue was irrelevant because they were immediate purchasers. As the property was no longer in the hands of the third and fourth defendants, the Court of Appeal affirmed the decision of the High Court that the third and fourth defendants to pay damages to the plaintiff. The Court of Appeal in holding that in lieu of the retransfer of the property, a claim in damages was available to the plaintiff had cited no authority.

[24] On the specific submission of the third and fourth defendants that the High Court erred in awarding damages to the plaintiff on the ground that damages were only available if the plaintiff had proved that he had been 'wronged' by the third and fourth defendants, this is what the Court of Appeal said:

> The fallacy of the submission is this: by virtue of s 340 sub-s (2)(b), the third and fourth defendants' title was defeasible. However as the property had passed to the hands of a subsequent acquirer for value without notice as envisaged in the proviso to s 340 sub-s (3), namely the seventh defendant, it followed that the property could not be retransferred back to the plaintiff.
>
> The plaintiff's remedy for the loss of the property, which is statutorily provided for in s 340 sub-s (2), is solely against the third and fourth defendants. As they are not in a position to return the property to the plaintiff, they are bound to make good such loss by paying damages. The fact that the third and fourth defendants were 'innocent' in that they were unaware of the falsity of the PA does not absolve them from such liability, because it is statutorily imposed under the said section. The contention that no damages are payable because the plaintiff was not 'wronged' by the third and fourth defendants is therefore misconceived.

[25] However, the Court of Appeal varied the date of the basis of assessment of damages as set out in the judgment of the High Court from the date of the judgment, ie 3 July 2014, to the date of execution of the Form 14A between the fraudulent second defendant and the third and fourth defendants, ie 17 July 2008. The Court of Appeal set out the reasons in the following terms:

> We did however allow an amendment of the date stipulated by the learned judge for the assessment of damages from 3 July 2014 (the date of the judgment) to the date when the property was transferred from the plaintiff to the third and fourth defendants by use of the false PA, namely 17 July 2008. We allowed this amendment because it appeared to us that the latter date more accurately reflected the basis for an estimation of loss to be computed, bearing in mind the entirety of the circumstances of the case.

THE QUESTION OF LAW ON APPEAL TO THE FEDERAL COURT

[26] As indicated earlier, this court granted leave on two questions of law. We will deal first with the remedy question. As the key to the determination of this question centered on the proper construction of s 340(1), (2) and (3) of the NLC, which introduced into our land law the concept of indefeasibility title, it is necessary to look more closely at the provision. It is therefore apposite to set out in extenso its terms as follows:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) In any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) It shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) Any interest subsequently granted thereout shall be liable to be set-aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[27] In considering these appeals, at the outset, it is necessary to bear in mind that indefeasibility can be immediate or deferred. Arifin Zakaria CJ (Malaya) (as His Lordship then was) in *Tan Ying Hong v Tan Sian San & Ors* explained the two concepts as follows:

> Immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis a vis the title or interest.

[28] Tan Sook Yee's *Principles of Singapore Land Law* (3rd Ed) at p 285 illustrated the difference between immediate and deferred indefeasibility as follows:

> In the early days of Torrens jurisprudence, there was some uncertainly as to whether a registered proprietor obtained an immediate indefeasible title or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next purchaser. An illustration of the difference between both theories is as follows: X is the original owner. Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, under the theory of deferred indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as against X. Indefeasibility of title is thus conferred to the next purchaser.

[29] In the context of the present case, the remedy question is inextricably intertwined with the application of the principle of deferred indefeasibility title under the Malaysian Torrens System in cases of transfer of titles by way of fraud, forgery and insufficient instruments. In order to answer the question posed it is therefore necessary to look at the principle more carefully.

[30] It should be noted that before the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit*, the predominant view was that s 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was decided by our then Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 where it was held that where the vendor's title is good but the instrument that was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to

as deferred indefeasibility, the registration of which can be set aside. It is irrelevant whether the immediate registered proprietor was a party or privy to the forgery or a bona fide purchaser for good value.

[31] However, the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* held that a purchaser in good faith for valuable consideration could obtain a good title to a land even though the instrument of transfer was a forged instrument. Most importantly, the court held that our land law applied immediate indefeasibility and not deferred indefeasibility. That was the case in which the respondent claimed that she was the registered proprietor of a piece of land, which had been sold and transferred to the appellant. The respondent claimed that someone forged her signature and sold and transferred the subject land to the appellant. She claimed to be restored as the registered owner of the land. The Federal Court held that the appellant was a proprietor with an immediate indefeasible title under s 340(1) of the NLC and could also claim to be a bona fide purchaser under the proviso to s 340(3). Hence, the appellant as the immediate proprietor obtained immediate indefeasible title to the land in question even if they purchased it through instrument of transfer, which was forged. The court decided that the appellant who had acquired the land directly from a forger to have an indefeasible title to the land because the appellant was regarded as a bona fide purchaser for value without notice. As a result of this decision, the respondent, as an innocent landowner, found herself deprived of her land by forged instrument of dealing. This brought about serious concerns amongst landowners who became vulnerable to their land even through instruments of transfer, which are forged.

[32] The uncertainties and concerns were finally laid to rest almost a decade later in the case of *Tan Ying Hong v Tan Sian San & Ors*. In that case, the plaintiff was the registered owner of a piece of land. The first defendant purporting to act under a power of attorney executed two charges in favour of the bank ('the third defendant') as security for a loan granted to the second defendant. The plaintiff claimed that he did not sign the power of attorney. Evidently, the power of attorney was forged, as the plaintiff never executed it. The most important issue in that case was whether s 340 of the NLC conferred immediate or deferred indefeasibility upon the registered proprietor or any person having registered interest in the land. The following single question was posed to the Federal Court: 'Whether an acquirer of a registered charge or other interest or title under the National Land Code 1965 by means of a forged instrument acquires an immediate indefeasible interest or title?' The Federal Court answered the question in the negative. In other words, it was held that the bank, that is to say, the third defendant in that case did not acquire an immediate indefensibility of interest on the land but a deferred one. The Federal Court ruled that *Adorna Properties Sdn Bhd v Boonsom Boonyanit* was wrongly decided. It was further held that the fact that the third defendant

acquired the interest in question in good faith for value was not in issue, because once the court was satisfied that the charges arose from void instrument, it automatically followed that they were liable to be set aside at the instance of the registered proprietor namely, the plaintiff.

[33] The reasons underlying this decision appeared in the judgment of the court given by Arifin Zakaria CJ (Malaya) (as His Lordship then was) as follows:

> [50] As we see it, sub-s (3) merely provides that any title or interest of any person or body which is defeasible by reason of any of the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso, which reads:
>
> > Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser, (Emphasis added.)
>
> [51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection, this in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.
>
> [52] Furthermore, eventhough sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
>
> For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[34] Zaki Tun Azmi CJ in that case summarised the effect of concept of indefeasibility of title under s 340 of the NLC in the following terms:

> (4) I would like to look at s 340 of the NLC in a more simplified manner.

(5) Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.

(6) As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

(7) Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s 340(2)(a) of the NLC). Otherwise B stands in the same position as A.

(8) The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (See s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

(9) The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-section (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

[35] The principle established in *Tan Ying Hong v Tan Sian San & Ors* was adopted and applied by this court in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768. That case illustrates the concept of deferred indefeasibility very well. It is important that we look at it a little more closely and consider the judgment in some detail.

[36] In *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* the deceased was the registered co-proprietor of a one-third undivided share in two lots of land. She died in Indonesia in 1941 without issue. Some 43 years later, the first respondent applied for and obtained an order to distribute the deceased's share in the two lots of land among himself and the first to fourth

respondents. The first to fourth respondents transferred their share in the two lots of land to the fifth and sixth respondents in consideration for the sum of RM25,000 and RM16,000 respectively. The appellants, who were the nephew and nieces of the deceased, filed a suit against the defendants whereby they sought to set aside the title to the two lots acquired by the fifth and sixth respondents. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. The appellants pleaded that the first to fourth respondents had acquired title to the two lots by fraud and misrepresentation, in that they falsely stated that they were the children or beneficiaries of the deceased when they applied for and obtained the order of distribution. As a result of this fraud the appellants claimed that the fifth and sixth respondents had not acquired an indefeasible title to the two lots. The appellants also pleaded that the seventh respondent, which was the governmental authority that granted the order of distribution, was negligent when it vested the deceased's share in the two lots to the first to fourth respondents. The appellants obtained judgment in default against the first to fourth respondents, who did not defend the claim. However, the fifth and sixth respondents claimed that as bona fide purchasers of value they had obtained an indefeasible title. Although the High Court held that the first to fourth respondents had no right to transfer title or interest in the lots to the fifth and sixth respondents, it went on to hold that the fifth and sixth respondents had yet acquired an indefeasible title or interest in the two lots, as they had not acquired their title or interest by fraud. The appellants appealed to the Court of Appeal.

[37] The Court of Appeal found fraud on the part of the first to fourth respondents but held that the fifth and sixth respondents, in absence of fraud on them, were protected by the proviso to s 340(3) of the NLC and had acquired an indefeasible title or interest. In allowing the appeal, the Federal Court noted that both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. However, both courts failed to inquire whether the fifth or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser was entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquired a title that was not indefeasible. Thus, even if the fifth and sixth respondents were bona fide purchasers, they could not by that fact alone have acquired a shield of indefeasibility unless they had been bona fide subsequent purchasers. In the present case, the first to fourth respondents, from whom the fifth and sixth respondents obtained title were not immediate purchasers but rather imposters of those entitled to the estate of the deceased. Therefore, when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated. As immediate purchasers, the fifth and sixth respondents were not protected by the proviso to s 340(3) of the NLC.

[38] Jeffery Tan FCJ in delivering the judgment of the court said that the defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. We find it instructive to quote the relevant passage from his judgment as follows:

> [43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents, who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

[39] At this juncture it would be appropriate to provide a summary of the principle of deferred indefeasibility up to this point. It is now settled that s 340 of the NLC provides for the concept of deferred indefeasibility and that the defeasible title of a bona fide immediate purchaser becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser. Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd Ed) at para 4.34 correctly state the law upon this subject matter: Deferred indefeasibility postpones the badge of immunity where registration was obtained by way of a forged or void or insufficient instrument until the title is registered in the name of a subsequent purchaser in good faith, whereupon indefeasibility will attach to the title or interest, as the case may be. Indefeasibility is deferred even where the registered proprietor or interest holder has not occasioned the defect in the instrument or was not party to the forgery.

[40] In this context, we would add that we find some cogency in the opinion of David SY Wong in his book *Tenure and Land Dealings in the Malay States*, where he said, with the necessary emphasis, as follows:

> The risk of any such loss being visited on a holder of registered title or interest in land is inherent in the working of the Torrens system. Indefeasibility of title is the protection given to a proprietor against adverse claims and by itself does not ensure protection against the proprietor being subsequently deprived of his title. In fact, once any person acquires an indefeasible title it must mean the extinguishment of the title in the hands of any previous proprietor even where the previous proprietor has been wrongfully or erroneously deprived of the same. Such risk is evidently greater under a Torrens system of 'immediate indefeasibility'. Nonetheless, even though under the Malaysian Torrens system a person who has, through fraud or acts of other persons, been deprived of his title may recover it from the immediate newly registered proprietor where the latter has acquired it in any of the specified circumstances under s 340(2), *once the title passes into the hands of a subsequent bona fide purchaser for valuable consideration, his right of recovery is gone beyond recall*.

[41] In similar vein, in her book *National Land Code A Commentary*, Judith Sihombing on p 797 says this:

> The deferred indefeasible title must be challenged timeously for otherwise the defeasible proprietor can pass an indefeasible title to a bona fide purchaser for value without notice.

[42] Reverting to the remedy question, the main submissions made on behalf of the third and fourth defendants may be summarised as follows. They accepted the principle enunciated in the case of *Tan Ying Hong v Tan Sian San & Ors*. However, it was highlighted that the case of *Tan Ying Hong v Tan Sian San & Ors* is distinguishable on its facts because in the present case at the material time when the plaintiff filed this action, the property was no longer available to the plaintiff because it had already been registered in the name of the subsequent purchaser, that is to say, the fifth defendant, who was also a bona fide purchaser for value without notice. Damages could only be awarded if s 340 of the NLC itself provides so. Section 340 does not provide for damages in lieu of the return of the property. All it provides is for the setting aside of the impugned title or interest, and consequently, the return of the property to the true owner, only if the property is still in the possession of the immediate purchaser. The plaintiff commenced this action on 9 August 2012. On this date, the property was no longer in the hands of the third and fourth defendants because they had already sold the property to the fifth defendant on 31 March 2010, which sale was registered on 11 August 2010. Had the plaintiff taken quick action against the third and fourth defendants before the latter sold the property to the fifth defendant then the plaintiff would have succeeded in having the property back. However, once the property had been sold to the fifth defendant, the title to the property was beyond recall.

[43] Learned counsel for the plaintiff responded as follows. Had the Court of Appeal taken the entire facts and circumstances into consideration, it could not possibly conclude that the third and fourth defendants were a bona fide

purchaser for valuable consideration. We do not see any merit in this line of argument. The court below had made an express finding that the third and fourth defendants had purchased the property in question in good faith for value. It has not been shown that the finding was plainly wrong or perverse in any way. In our view, the entire evidence of facts and circumstances was amply sufficient to justify that finding.

[44] Learned counsel for the plaintiff also referred to the case of *Tara Rajaratnam v Datuk Jagindar Singh & Ors* [1983] 2 MLJ 127 to support his contention that s 340 of the NLC not only allowed the court to set aside the impugned transfer but also to award damages to the plaintiff in lieu of the title as the property was no longer in the hands of the third and fourth defendants.

[45] For the proper determination of this case, as submitted by learned counsel for the third and fourth defendants, it is imperative to bear in mind that the facts of this case are different from the facts in *Tan Ying Hong v Tan Sian San & Ors*. By contrast in that case, as stated earlier, the first defendant who was the wrongdoer acted under a forged power of attorney executed two charges in favour of the bank to secure a loan for the second defendant. Subsequently, the second defendant reneged on the repayment and the bank therefore demanded payment from the plaintiff. The bank was still the registered chargee at the time of filing of the suit. That is why, the Federal Court had little difficulty in declaring the bank's charges void and set it aside since at the time of filing of the suit and at the date of judgment, the bank was still the registered chargee.

[46] On the other hand, in the present case, the difficulty arose because at the material time the plaintiff filed the action in the High Court, the third and fourth defendants as immediate purchasers were no longer the registered proprietors of the property since they had sold it to the fifth defendant, the subsequent purchaser who had, evidently, purchased the property in good faith for value. That is the crucial difference between the present case and the case of *Tan Ying Hong v Tan Sian San & Ors*. This raises a difficult point of law. This difficulty, undeniably, confronted both the High Court and Court of Appeal. In this, the High Court and the Court of Appeal had no precedent to fall back on.

[47] On the basis of the law as we apply today, as set out by this court in *Tan Ying Hong v Tan Sian San & Ors*, which was subsequently followed by *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* and the recent decision of this court in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, the third and fourth defendants were immediate purchasers. As immediate purchasers of a title tainted by a forged power of attorney, they acquired a title that was not indefeasible. That the third and fourth defendants were bona fide purchasers could not by that fact alone give a shield of

indefeasibility. The defeasible title of the third and fourth defendants was still liable to be set aside before the fifth defendant, the subsequent purchaser became the holder of the registered title of the property on 11 August 2010. However, by the time the plaintiff as the true original registered proprietor commenced the present action on 9 August 2012, the defeasible title of the third and fourth defendants as bona fide immediate purchasers had become indefeasible when it was subsequently passed to the fifth defendant, a bona fide subsequent purchaser. It therefore follows that the High Court and the Court of Appeal had gone too far to declare that the transfer of the property from the original owners (that is to say the parents of the plaintiff) to the third and fourth defendants was void. Unlike in the case of *Tan Ying Hong v Tan Sian San & Ors*, the issue of setting aside the third and fourth defendants' title to the said property did not arise as the property had been sold to the fifth defendant, who was bona fide purchaser without notice; a retransfer of the property to the plaintiff's name was therefore not possible in the circumstances. The plaintiff's right of recovery of the property, to borrow the words of David SY Wong, 'is gone beyond recall'.

[48] Given the above circumstances, the most important question that we must ask here is whether in lieu of the retransfer of the property, a claim in damages is available to the plaintiff as the true owner of the property under s 340 of the NLC. In our judgment, the question must be approached on the basis of the provision itself. The plaintiff's case must stand and fall on the basis of this specific provision. It is to that provision we must look at. It is necessary to read the wordings and purport of the provision with great care. The first important point to notice is that s 340(2) of the NLC creates a cause of action, which is in effect a form of action independent of any common law claim for tort or breach of contract. Over and above this, it is important to appreciate that the cause of action envisaged under s 340 of the NLC is a statutory claim, where the relief is explicitly specified therein, that is to say, setting aside the title or interest in question. Once the legislative scheme in s 340 is properly understood, it is apparent that the provision does not envisage a relief in damages at all; there is clearly no provision in relation to damages. In this regard, there is a general rule that when right is created by a statute and a special sanction is also given by the same statute regard must be had to that sanction, and the obligation can only be enforced in the prescribed manner (see *The Cobar Corporation Limited and Rubind Henrik Corbett (Trustee) v The Attorney-General for New South Wales* [1909] HCA 52; [1909] 9 CLR 378).

[49] Legal rights are either in rem or in personam. We should point out that a statutory claim brought to set aside a title or interest upon one or more of the grounds of defeasibility specified under s 340 of the NLC, as in the present case, is an action in rem brought for the assertion of property, which is enforceable against the world at large, as opposed to right in personam for

damages which is enforceable against specified person arose about of an obligation whether in contract or in tort (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and *Webb v Webb* [1994] QB 696). Some 60 years ago, in the case of *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97, Thomson J (as His Lordship then was) reminded us that many of the difficulties in cases relating to land, 'would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights'. We will deal with the plaintiff's claim in personam for damages at a later stage of this judgment.

[50] *McGregor on Damages* (18th Ed), at p 3, observed that it is impossible to search for a clear-cut, comprehensive meaning of the term 'damages'. According to *McGregor* damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong that is either tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling. In short, in general terms, damages are an award in money for a civil wrong. There is no right to an award of damages unless the court has power to award it. Support for this proposition can be found in *McGregor on Damages* at pp 5–8 as follows:

> The vast number of money claims are claims for compensatory damages arising from tort or breach of contract; the everyday damages action is so based. There are however also claims for money, which are neither claims dependent upon tort or breach of contract nor claims for damages. For the sake of clarity it is important to identify these claims for money which are not required to satisfy any definition of damages because they fall outside it. After these there remain those claims which are indeed actions for damages but are not dependent upon there being a tort or breach of contract. These are the cases which do not satisfy the general definition. They are, as will be seen, indeed few so that it can be said that there has been little departure from this central requirement in the definition.
>
> (a) Money claims, which are not based upon a tort or breach of contract and are not actions for damages. There are four types of case in which pecuniary satisfaction is gained by success in an action and which are yet outside the above definition. These are actions for money payable by the terms of a contract, actions in restitution, actions in equity and actions under statutes where the equitable or statutory right to recover is independent of any tort or breach of contract.
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> (1) ...
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> (2) ...
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> (3) ...
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> (4) actions claiming money under statutes, where the claim is made independently of a wrong which is a tort or breach of contract, are not actions for damages.

[51] We now turn to deal with the decision of *Tara Rajaratnam v Datuk Jaginder Singh & Ors*, which was much canvassed by learned counsel for the plaintiff in his written submission. We have read in detail the judgment of the High Court to point out that the High Court had treated the damages it awarded to the plaintiff on the basis of the common law of deceit and not on s 340 of the NLC. Very briefly, in that case, the plaintiff complained that her own lawyers had defrauded her. Having got the land registered in their names, the land was subdivided and the plots were sold to several members of the public, who were bona fide purchasers without notice. When the plaintiff filed the action the land was no more in the hands of the lawyers who were the immediate registered proprietors. Hence, a retransfer of the land to the plaintiff was not possible. In his judgment, Abdul Razak J was very clear that his award of damages was based on the tort of deceit and not on s 340 of the NLC. This was the conclusion of the learned judge:

> The first, second and third defendants shall be jointly and severally liable for the tort of deceit but the first and second defendants shall be jointly and severally liable for the breach of contract.
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> ...
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> I would therefore in the circumstances award a sum of $973,000 as general damages to the plaintiff with costs to be taxed. As I said earlier this sum represents the award for the tort of deceit only, but having considered the other claims, it would necessarily also cover them, if need be. This sum, as has already been stated does not include the amount for exemplary damages.

[52] Subsequently, the lawyers appealed to the Federal Court. The appeal was dismissed. The judgment of the Federal Court is reported as *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196. In this regard, an analysis of that case by Professor Visu Sinnadurai in his book, *Sale and Purchase of Real Estate in Malaysia* is instructive. This is what the learned professor said:

> One of the important issues dealt with by the Federal Court in *Datuk Jaginder Singh v Tara Rajaratnam* was the measure of damages which should be awarded to the respondent. As the property had already been subdivided and sold to several members of the public, who were bona fide purchasers without notice, a re-transfer of the property to the respondent's name was not possible.
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> ...
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> Furthermore, as the appellants were found liable for fraud, breach of contract, undue influence and breach of trust, the proper mode of giving relief to the respondent posed further difficulties. The Federal Court, however, agreed with the assessment of damages by the trial Judge. Lee Hun Hoe CJ said:
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> > In assessing damages the learned Judge has clearly kept in mind the purpose and aim of the compensation, whether for breach of contract or fraud, the general rule of putting 'the person whose right has been invaded in the same position as if it had been respected'.

His Lordship then said:

> The learned Judge had gone into the case very thoroughly and carefully ... In the exercise of his discretion the learned Judge decided to do the best he could in assessing damages ... He decided to award damages for fraud, which would also cover other heads of damages.
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> Though the Federal Court agreed with the trial Judge on the assessment of damages, the basis upon which such damages were assessed was not made clear. Counsel for the appellants had earlier argued that he was not relying on the common law fraud but rather on actual fraud as laid down under section 340 of the National Land Code. He further submitted that if the Court found fraud under 340, the Court had only the power set aside the transfer and not to award damages. It is not clear whether in fact the transaction between the parties was challenged on the grounds of fraud as defined in section 17 of the Contract Act. The judgment of the Federal Court was focussed mainly on the definition of 'fraud' under section 340 of the National Land Code and a comparison of that definition with fraudulent misrepresentation under the common law. The Federal Court was correct in holding that fraud under the National Land Code was not limited to 'fraudulent misrepresentation' alone. But whether fraud as defined in the Contract Act was narrower or broader than fraud under the National Land Code was not made clear. There is, however, some suggestion by counsel for the respondent that fraud under the Torrens system is wider than the definition of fraud under the common law.
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> ...
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> ... Though in *Tara Rajaratnam*'s case, the Federal Court agreed with the measure of damages awarded by the trial Judge 'on the basis of fraud' which was 'the highest attainable' and would necessarily cover the claim for undue influence, breach of contract or trust as well, the Court did not spell out whether this award of damages for fraud was under section 340 of the National Land Code or section 17 of the Contract Act or both. It was rather unfortunate that there was no detailed discussion in the Federal Court as to the law relating to the recovery of damages for fraud.

[53] The matter then went up on appeal to the Privy Council (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105). Lord Keith of Kinkel in delivering the judgment of the board underlined the crucial fact that the claim upon which the plaintiff had thus obtained judgment in the High Court was based upon a number of grounds — fraud, breach of contract, undue influence and breach of trust. Lord Keith laid emphasis that the High Court found that fraud had been established against all three appellants and its finding was upheld by the Federal Court. To bring home the point that s 340 of the NLC had no bearing on the award of damages, this is what Lord Keith said:

> The judgments both of Abdul Razak J and the Federal Court are very lengthy, particularly the former's, and in some respects difficult to follow. Consideration was

given, at particularly great length by the Federal Court, to the meaning of the word 'fraud' in s 340 of the National Land Code, a matter which at the hearing before the Board was agreed by counsel on both sides to be irrelevant.

[54] Put simply, the board had clearly spelt out that the award of damages was not made under s 340 of the NLC but in point of fact were awarded in tort. Learned counsel for the plaintiff was therefore plainly wrong in treating the case of *Tara Rajaratnam v Datuk Jagindar Singh & Ors* as having stated the proposition that s 340 of the NLC not only allowed the court to set aside the impugned transfer but also to award damages as the property was no longer in the hands of the third and fourth defendants.

[55] Moreover, in our view, to accede to the interpretation contended by learned counsel for the plaintiff that damages may be awarded would tantamount to reading into s 340 of the NLC words, which are not there. With respect, as judges, we are not entitled to read words into a statute unless clear reason for it is to be found in the statute itself. In this context, Nik Hashim FCJ in delivering the decision of this court in *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581; [2007] 5 CLJ 673 said:

> [18] In construing a statute the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.
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> [19] In *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; [1986] 1 LNS 79 Seah SCJ delivering the judgment of the then Supreme Court reminded at pp 22 and 23:
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> > It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act, which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a court censure on the Legislature (see *Lord Chelmsford in R v Hughes* and *Lord Macnaghten in Vacher & Sons v London Society of Compositors*).
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> [20] The case of *NKM Holdings Sdn Bhd*, was referred to by my learned brother Augustine Paul FCJ in the recent case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 where he said at p 200:
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> > Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in Amalgamated Society of *Engineers v Adelaide Steamship Co Ltd*

[1920] 28 CLR 129 at pp 161–162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[56] By awarding damages to the plaintiff, the High Court and the Court of Appeal had extended the scope of s 340 of the NLC. With respect, the High Court and the Court of Appeal had no jurisdiction to do so. The award of damages is not within the contemplation of the legislature.

[57] As a result, for all the reasons set forth earlier, we therefore conclude that s 340 of the NLC does not provide for the remedy of damages. In our judgment, all that s 340 provides is the setting aside of the impugned title or interest upon one or more of the grounds of defeasibility specified therein. Yet again, keeping in mind that it is an action in rem, which is an action directed towards property, we are not at all convinced that under s 340 of the NLC the court has the power to award damages. With respect, both the High Court and the Court of Appeal erred in law and in fact culminating in a miscarriage of justice in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. This is in itself sufficient to warrant appellate interference on our part.

[58] Thus far, we are firmly of the view that under s 340 of the NLC the court has the power to set aside a title or interest but not to award damages. Leaving that on one side for the moment, it is relevant to note that, as we have said earlier, in his statement of claim, the plaintiff also specifically claimed damages against the third and fourth defendants.

[59] It is to be emphasised here that the concept of indefeasibility does not exclude the court's jurisdiction to grant relief in a claim in personam founded in law or equity which is enforceable against or binding on the registered proprietor (see Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* at para 4.152). Lord Wilberforce in *Frazer v Walker and Others* [1967] 1 All ER 649; [1967] 1 AC 569 emphasised that the principle of indefeasibility of title 'no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant'. In the case of *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR (R) 220, the Singapore Court of Appeal held that the indefeasibility of title of a registered

proprietor, or its agent, of land under the Land Titles Act (Cap 157, 1994 Rev Ed) was subject to exceptions, two of which were fraud on the part of the registered proprietor or its agent and claims in personam made against the registered proprietor or its agent by reason of his own conduct.

[60] We once again return to the present case. The plaintiff's claim in personam for damages against the third and fourth defendants was founded in tort of negligence. In his statement of claim the plaintiff averred that the third and fourth defendants accepted the transfer of the property from the second defendant even though they had reasons to know that the power of attorney was false. This is how it was pleaded in para 9 of the statement of claim:

9. The third and fourth defendants were negligent as follows:

PARTICULARS OF LIABILITY OF THE 3RD AND 4TH DEFENDANTS

a. Had transferred the Land from the 2nd Defendant wrongfully even though they had valid reasons to know that the said PA was false.

b. Had transferred the Land fraudulently from the 2nd Defendant even though they had reasons to know that the 2nd Defendant had no right to execute the Form 14A.

c. Had purchased the Land fraudulently with the intention to gain profit upon selling the Land to others.

d. Had caused the Estate the loss by the said registration on the Title.

e. Had transferred the Land fraudulently and or caused the Land to be transferred fraudulently to the 5th Defendant.

f. Had caused the Estate loss of interest by the registration of the ownership on the Title.

g. Failing to ensure that the ownership of the Estate was not disturbed as guaranteed under the NLC.

h. Failing to take all reasonable steps to correct the situation so that the interest of the Estate would be returned when claimed by the Plaintiff.

i. Causing the Plaintiff the failure in getting the transmission done by registering his name as the Administrator of the Land.

[61] However, when it came to adducing evidence, the plaintiff had not at all brought home the case of negligence against the third and fourth defendants. There was no attempt whatsoever by the plaintiff to affix any knowledge of the defective power of attorney on the part of the third and fourth defendants. On the contrary, the third and fourth defendants had proven their defence as bona fide purchasers of the property for value without notice. In our judgment, in the circumstances of this case, damages as a relief in a claim in personam

founded in tort were only available if the plaintiff had proven that the third and fourth defendants had wronged him in a way as can be seen in the case of *Datuk Jagindar Singh & Ors v Tara Rajaratnam*. We draw support for this view from the judgments in *Hay Or Bourhill v Young* [1942] 2 All ER 396 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. Unfortunately for the plaintiff, this was not the case here.

[62] True, the plaintiff had suffered. But in the circumstances of this case his remedy is against the second defendant, who was the one who wrongfully caused the plaintiff's loss. The plaintiff had obtained judgment in default against the second defendant. The plaintiff should then proceed to assess damages against the second defendant.

CONCLUSION

[63] For all the reasons that we have explained, we conclude by saying that we will answer the remedy question in the negative. Consequently, it is not necessary to answer the calculation of damages question. We would prefer to leave the point open.

[64] In the result, we allow the appeal by the third and fourth defendants with costs. The appeal by the plaintiff is dismissed. Consequently, the orders of the High Court and the Court of Appeal are set aside.

Third and fourth defendants' appeal allowed with costs and plaintiff's appeal dismissed.

Reported by Kohila Nesan